

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

KENNETH C. GJULLIN,

Debtor.

Case No. **05-63825-7**

MEMORANDUM OF DECISION

At Butte in said District this 22nd day of March, 2006.

Pending in this Chapter 7 case are the Trustee's objection based upon 11 U.S.C. § 522(o) to Debtor's homestead exemption, filed November 30, 2005, and the Debtor's response and motion to dismiss Trustee's objection, filed January 23, 2006. The Court held a hearing on the Trustee's objection at Great Falls on January 26, 2006. The Court consolidated these matters at the hearing on Debtor's motion to dismiss the Trustee's objection which was held on February 23, 2006. The Debtor Kenneth C. Gjullin ("Ken" or "Debtor") appeared represented by attorney Randy L. Tarum ("Tarum"), of Great Falls, Montana, and testified at the hearing on January 26,

2006. The Trustee, Gary S. Deschenes, of Great Falls, Montana, appeared, and his Exhibits (“Ex.”) 1, 2, 3 and 4 were admitted into evidence by stipulation. After conclusion of parties’ cases-in-chief the Court granted the Trustee time to file a brief¹, after which the matter would be taken under advisement. The Court has reviewed the parties’ briefs, the record and applicable law. These matters are ready for decision. For the reasons set forth below the Trustee’s objection to Debtor’s homestead is overruled, and Debtor’s motion to dismiss the Trustee’s objection is denied.

This Court has jurisdiction of this Chapter 7 bankruptcy under 28 U.S.C. § 1334(a). The Trustee’s objection to exemption is a core proceeding under 28 U.S.C. § 157(b)(2). At issue is whether the Trustee satisfied his burden of proof to show that the Debtor transferred proceeds from the sale of his pickup truck to his homestead with the intent to hinder, delay, or defraud a creditor and therefore could not exempt a part or all of the his homestead under § 522(o). This Memorandum of Decision includes the Court’s findings of fact and conclusions of law.

FACTS AND PROCEDURAL HISTORY

Debtor Ken Gjullin lives near Conrad, Montana. He returned from Alaska in April 2004, after being laid off from his employment and a divorce. When he returned Ken brought with him a 2000 GMC pickup truck (hereinafter the “pickup truck”) which he owned free and clear of any liens. Ken testified that he discussed moving back with his father Vernon Gjullin (“Vernon”), and in addition discussed Vernon buying Ken’s pickup truck to pay for a home for Ken in Montana. When he returned from Alaska he moved in with his parents, and only later found employment.

¹Debtor’s brief was filed on January 22, 2006.

Ken testified that he kept the pickup truck for almost a year after returning, even though he was not employed, because he needed transportation. But, because of the pickup truck's poor gas mileage (only about 10 m.p.g.), Ken testified he purchased a Mercury Cougar and parked the pickup truck. Although it was parked, Ken testified that he continued to pay for full collision insurance coverage for the pickup. He testified that he needed to keep the value of the pickup truck in order to use it to purchase a home. Ken testified that the insurance for the pickup was three times as much as insurance for the Mercury, and because of the expense he could no longer afford to keep the pickup.

Ken testified that he needed a place to live more than he needed a pickup truck, and that selling the pickup became an economic necessity. He sold the pickup truck to Vernon for the sum of \$13,500, and with the proceeds he purchased a 2005 Friendship single wide trailer which he claimed as a homestead. Ex. 2 includes a copy of a check dated June 15, 2005, in the amount of \$13,500.00 written to Ken by Vernon with the notation "Pickup 2000 Chev." Ken testified that the sale of his pickup coincided with his finding employment and regaining the ability to purchase a home.

Five days later, Ken testified, he wrote a check for the purchase of a mobile home using the proceeds from the sale of his pickup. Ex. 1 is Ken's bank statement at Stockman Bank in Conrad and reflects a \$13,300.00 check #2088 with the date June 20, 2005. Ex. 2 includes a copy of the \$13,300.00 check #2088 showing the date written as June 16, 2005, to Patty Seaman Homes.

Ken testified that his father financed the remainder of the purchase price of the mobile home, in a total amount of \$47,600.00, and that Ken borrowed approximately \$34,000 from his

father for the purchase to cover the amount remaining after applying the pickup proceeds. Ex. 3 shows that Vernon is named on the certificate of title for the 2005 Friendship mobile home as a party with a security interest in the mobile home with a claim stated as \$34,218.00 as of July 19, 2005. Ex. 4 is a promissory note in the amount of \$34,300.00 dated July 28, 2005, signed by Ken and Vernon in which Ken promises to pay the note amount in \$500.00 installments. Ken testified that the lien shown on Ex. 3 predates the promissory note on Ex. 4 because he asked Patty Seaman Homes to apply for the lien on the mobile home title for him.

Ken testified that he first consulted with his attorney Tarum in July of 2005, after he had decided to sell his pickup truck and purchase a mobile home with the proceeds. He testified that he knew from speaking with Tarum that he would lose his pickup truck in a bankruptcy, but he testified that he had already spoken with his father and decided to sell the pickup and purchase a home with the proceeds before he consulted Tarum. Ken's main objective, he testified, was to purchase a home, and he placed the mobile home approximately 10 miles outside of Conrad on "very rural" land belonging to Vernon². At the time of the purchase, Ken testified, it was more important to him to buy a home than to pay his creditors or pay for a bankruptcy, although he testified that he was under no pressure from creditors at the time he sold his pickup truck.

Ken filed a voluntary Chapter 7 petition on October 5, 2005, with Schedules and Statements listing assets with a total value of \$49,595.00, including the 2005 Friendship single wide trailer he claimed as his homestead with a value of \$45,000, in which he claimed an exemption of \$100,000 under Mont. Code Ann. § 70-32-104. Schedule D lists his father Vernon

²Ken's mobile home is hooked up to electricity and phone service, but he has to haul his own water.

Gjullen's [sic] claim secured by the mobile home in the amount of \$34,300.00. Ken testified that no lawsuits had been filed against him when he filed his Chapter 7 petition, and no collection activity had occurred. His largest creditor was from the repossession of his prior mobile home he owned in Alaska³. Schedule I lists his employment for a period of 2 months as a truck driver at Cenex Harvest States.

Ken testified that the value of his homestead at the time of trial was between \$43,000 to \$45,000, but that he could not sell it for that because it would have to be moved at a cost of \$6,000 to break it down, reducing the net value from \$37,000 to \$39,000.

The first meeting of creditors pursuant to 11 U.S.C. § 341(a) was held on October 31, 2005. The Trustee filed his objection to Debtor's homestead on November 30, 2005, on the grounds the \$100,000 homestead "is in violation of 11 U.S.C. § 522(o) and the debtor is not entitled to an exemption in said property." On December 7, 2005, Debtor amended Schedule C to reduce the value of the claimed homestead exemption to \$89,200.00, and also responded to the Trustee's objection arguing that § 522(o), among other things, is "incapable of meaningful interpretation" and that the Trustee cannot show that the Debtor sold his truck with the intent to hinder, delay, or defraud a creditor. Ken testified that his father sold the pickup two months before the January 26, 2006 hearing, for about \$10,000.

A Discharge of Debtor was entered on January 3, 2006. On January 23, 2006, prior to the hearing, the Debtor filed a motion to dismiss the Trustee's objection on the grounds it is moot because of Debtor's amendment to Schedule C and that the Trustee did not object to Debtor's

³Schedule F lists Asset Acceptance as the largest creditor with a claim in the amount of \$64,301.00.

amended exemption within 30 days of the amendment as required under F.R.B.P. 4003(b). The Trustee responded after the hearing on February 2, 2006, that Debtor's amendment had no effect on his objection, and set the Debtor's motion to dismiss objection for hearing. The Court by Order entered on February 23, 2006, consolidated the Debtor's motion to dismiss with the Trustee's objection, and both are disposed of in this Memorandum of Decision.

CONTENTIONS OF THE PARTIES

The Trustee objects to the allowance of Debtor's homestead exemption as a violation of § 522(o). The Trustee argues that the Court should deduce from all the facts and circumstances the Debtor's actual intent to hinder, delay or defraud a creditor, citing this Court's recent decision in *In re Lacounte*, 21 Mont. B.R. 310 (Bankr. D. Mont. 2005) and cases cited therein. The Trustee contends that fraudulent intent may be inferred based upon the facts that the Debtor retained the pickup truck after he returned to Montana, sold it and used the proceeds to purchase the trailer home which he placed upon his father's property and gave his father a lien. The Trustee focuses on Debtor's discussions with his attorney Tarum where he was informed that he would lose his pickup to a trustee in a bankruptcy, and argues that the Debtor proceeded to manipulate the nonexempt pickup by placing it in an exempt homestead. The Trustee argues that creditors were hindered by the Debtor's actions by loss of the proceeds. The Trustee urges the Court to conclude that the purpose of § 522(o) is to prohibit Debtor from benefitting from exemption planning by disposing of nonexempt assets and increasing his homestead exemption. The Trustee concludes by requesting that the Court both "deny Debtor's homestead exemption *and* reduce any equity protected by the homestead by the sum of \$13,500.00." (Emphasis added).

Debtor moves to dismiss the Trustee's objection arguing that the Trustee did not file an

objection to Debtor's amended exemption within the 30 days allowed by F.R.B.P. 4003(b), and that the Trustee is barred from objecting to the amended exemption under *Taylor v. Freeland & Kronz*, 503 U.S. 638, 644, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992) which states: "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality."

The Debtor raises several defenses to the Trustee's objection to exemption, beginning with asserting Debtor's automobile exemption to preserve a \$2,500 exemption if the homestead is disallowed, and if it is allowed then reducing his claimed homestead exemption to \$93,718 under *Lacounte* to reflect Debtor's actual \$6,282 in equity in the mobile home. Next, Debtor argues that costs of statutory sale of a homestead must be considered to determine whether a sale is economically feasible.

Mostly, however, Debtor argues that he did not intend to hinder, delay or defraud a creditor in violation of § 522(o). Debtor argues that he did not have a home after he returned to Montana and he needed a home, but had two cars including the pickup truck which he no longer needed. He contends that the Trustee failed to show that he intended to defraud any specific "creditor" as plainly stated in § 522(o), rather than any creditors, and that this Court erred in *Lacounte* by expanding the scope of § 522(o) to refer to creditors in general. Next, Debtor argues that construction of § 522(o)'s clause referring to "value of an interest in" property does not reduce the amount of exemption that Debtor is entitled to claim under Mont. Code Ann. ("MCA") § 70-32-104 because of the plain meaning of that clause, and liberal interpretation of Montana's homestead exemption statutes, which apply under Montana's "opt out", and those Montana statutes' humanitarian purposes and underlying public policy. Debtor contends that the Court erred in *Lacounte* by reducing the debtors' homestead rather than reducing the value of

their interest in the property. Debtor asserts that he is entitled to the statutory homestead exemption of \$100,000 regardless of whether the Court by operation of § 522(o) reduces the value of his interest in the homestead property to \$1.00.

DISCUSSION

This Court need not decide each and every argument put forward by the parties in order to decide the pending matters before it. Rule 4003(c), F.R.B.P., provides in pertinent part that “the objecting party has the burden of proving that the exemptions are not properly claimed.” Thus, the Trustee has the burden of proof. The applicable standard of review under § 522(o) is proof by a preponderance of the evidence. *Lacounte*, 21 Mont. B.R. at ___, citing 4 LAWRENCE P. KING, COLLIER ON BANKRUPTCY, ¶ 522.08[5][b] (15th ed. rev.).

A. Debtor’s Motion to Dismiss.

Beginning with the Debtor’s motion to dismiss the Trustee’s objection, it is based upon the Trustee’s failure to file a renewed objection to exemption within 30 days after Debtor amended his Schedule C on December 7, 2005, by reducing his claimed homestead exemption from \$100,000 to \$89,200, with no other relevant change. No contention is made that the Trustee failed to file his objection within 30 days of the meeting of creditors. Rule 4003(b), F.R.B.P., provides in pertinent part:

Objecting to a Claim of Exemptions. A party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.

Debtor’s amendment to Schedule C did not cure the Trustee’s objection, which sought

disallowance under § 522(o) of Debtor's entire homestead exemption. Rather, the amendment simply reduced the value of the claimed exemption. Thus the Trustee's objection to exemption was timely and was not cured by the Debtor's amendment to Schedule C. The Court rejects the Debtor's argument that his minor amendment to a claimed exemption, which did not address the merits of or cure the Trustee's objection, somehow renders the objection moot or subject to automatic exemption under *Taylor*. Such a practice would lead to absurd results and invite abusive tactics such as a potentially endless series of minor or cosmetic amendments to Schedule C prompting repeated objections in order to avoid automatic exemption under *Taylor*, which could prolong the dispute indefinitely and prevent the objection from ever coming before the Court. In the instant case the Trustee followed the safer approach of taking "a conservative and skeptical view of exemption claims, and refuse[d] to accept any claim of exemption that [was] not clearly legitimate on its face." See, e.g., *In re Clark*, 266 B.R. 163, 171 (9th Cir. BAP 2001).

Rule 4003(b) requires that an objection to the list of property claimed as exempt be filed within 30 days after the meeting of creditors *or* within 30 days after any amendment to the list. The Trustee's objection was timely and placed the matter at issue. Debtor's amended Schedule C did not change the "list of property claimed as exempt", but rather only amended the value of the claimed exemption. The Court concludes that the Trustee's timely objection was not rendered moot or subject to automatic exemption under *Taylor*, and the Debtor's amended Schedule C did not start another 30-day objection period running under Rule 4003(b). Accordingly, the Court denies Debtor's motion to dismiss and turns to the merits of the Trustee's objection.

B. § 522(o).

The Trustee objects to Debtor's homestead exemption based upon § 522(o) which was enacted in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and provides:

For purposes of subsection [522(b)(3)(A)], and notwithstanding subsection (a), the value of an interest in –

- (1) real or personal property that the debtor or a dependent of the debtor uses as a residence;
- (2) a cooperative that owns property that the debtor or dependent of the debtor uses as a residence;
- (3) a burial plot for the debtor or a dependent of the debtor; or
- (4) real or personal property that the debtor or a dependent of a debtor claims as a homestead;

shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection [522(b)], if on such date the debtor had held the property so disposed of.

Lacounte, 21 Mont. B.R. at ____.

The bankruptcy court in *In re McNabb*, 326 B.R. 785, 787-88 (Bankr. D. Ariz. 2005) explained § 522(o) as follows:

Bankruptcy Code § 522(o) provides that the value of property claimed as a homestead must be reduced to the extent that the value is attributable to any fraudulent transfers of nonexempt property made by the debtor within 10 years prepetition. Code § 522(o) was added by BAPCPA § 308. BAPCPA § 308 is one of the exceptions to the general effective date rule, because BAPCPA § 1501(b)(2) provides that the amendments made by § 308 shall apply to cases filed on or after the date of enactment. Consequently, Bankruptcy Code § 522(o) applies in this case.

See also Lacounte, 21 Mont. B.R. at ____.

1. “Opt Out”.

Debtor argues that § 522(o) does not reduce his exemption and that this Court erred in *Lacounte* because of Montana’s “opt out” of the federal exemption scheme, the plain meaning of the phrase “value of an interest” in § 522(o), and that under the liberal interpretation of Montana’s homestead exemption statutes, their humanitarian purposes and underlying public policy, he is entitled to Montana’s statutory homestead exemption of \$100,000 regardless of whether the Court reduces the “value of an interest” in the homestead by operation of § 522(o). This argument misapprehends the origin, mechanics, and effect of the “opt out”.

The Montana Supreme Court explained that a state may opt out of the federal exemption scheme under then-§ 522(b)(1), and that Montana has opted out of the federal exemption scheme by means of MCA § 31-2-106⁴. *In re Zimmermann*, 2002 MT 90, ¶ 8, 309 Mont. 337, ¶ 8, 46 P.2d 599, ¶ 8, 19 Mont. B.R. 368, 370. Under BAPCPA the opt out provision was renumbered to § 522(b)(2) and now reads: “Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph [522(b)(3)(A)] specifically does not so authorize.” In the instant case Montana law is the “State or local law” referred to in § 522(b)(3)(A) and specifically prohibits exemption under the federal exemption scheme of § 522(d). MCA § 31-2-106(a). However, nothing in the Montana statutory scheme attempts to, or as Debtor contends, has the effect of rendering § 522(o) inapplicable or ineffective.

⁴Section 31-2-106 provides in pertinent part: “**Exempt Property – bankruptcy proceeding:** An individual may not exempt from the property of the estate in any bankruptcy proceeding the property specified in 11 U.S.C. § 522(d). An individual may exempt from the property of the estate in any bankruptcy proceeding: (1) that property exempt from execution of judgment as provided in . . . Title 70, chapter 32,”

On the contrary, Montana State exemption law applies in this bankruptcy only pursuant to and by operation of § 522(b)(3)(A), which provides:

(3) Property listed in this paragraph is

– (A) *subject to subsections (o) . . . any property that is exempt under Federal law, . . . , or State or local law* that is applicable on the date of the filing of the petition at the place in which the debtor’s domicile has been located for the 730 days immediately preceding the date of the filing of the petition, or if the debtor’s domicile has not been located at a single State for such 730-day period, the place in which the debtor’s domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period that in any other place.

(Emphasis added). Not only does § 522(b)(3)(A) begin by making State law such as Montana’s homestead statutes “subject to subsection[] o”, but § 522(o) begins by stating: “For purposes of subsection (b)(3)(A)”. Such language is plain, clear and unambiguous that § 522(o) applies in determining property that the Debtor claims as an exempt homestead in this case. Debtor’s contention that Montana’s liberal homestead exemption⁵ somehow trumps operation of § 522(o) is at odds with plain, specific and redundant statutory language which applies § 522(o) to the statute authorizing State exemption law, § 522(b)(3)(A), and Debtor’s contention thus fails to persuade.

2. Intent to Hinder, Delay, or Defraud.

The Trustee argues that the purpose of § 522(o) is to prohibit Debtor from benefitting from exemption planning by disposing of nonexempt assets and increasing his homestead exemption. This Court in *Lacounte* rejected such a premise, noting the long standing rule in this

⁵Under Montana law homestead and exemption statutes must be liberally construed in favor of debtors. Constitution of the State of Montana, Article XIII, section 5; *Zimmermann*, ¶ 15, 19 Mont. B.R. at 373; *MacDonald v. Mercill* (1986), 220 Mont. 146, 714 P.2d 132, 135; *De Fontenay v. Childs* (1933), 93 Mont. 480, 485, 19 P.2d 650, 651.

and other jurisdictions that purposeful conversion of nonexempt assets to exempt assets on the eve of bankruptcy is not fraudulent per se. *Lacounte*, 21 Mont. B.R. at ___, citing *Wudrick v. Clements*, 451 F.2d 988, 989-90 (9th Cir. 1971); see also *In re Stern*, 345 F.3d 1036, 1043 (9th Cir. 2003), cert. denied 541 U.S. 936, 124 S.Ct. 1657, 158 L.Ed.2d 356 (2004). Instead, this Court noted that the phrase from § 522(o) “intent to hinder, delay, or defraud” is a term of art not defined in the Bankruptcy Code yet also appears in 11 U.S.C. § 548(a)(1)(A) and 11 U.S.C. § 727(a)(2), and concluded that because Congress drafted § 522(o) with the identical term of art used in §§ 548(a)(1)(A) and 727(a)(2), case law construing those statutes provides instructive guidance with respect to § 522(o). *Lacounte*, 21 Mont. B.R. at ___.

The court in *McNabb* also noted that the phrase “hinder, delay, or defraud” may be a term of art meant to refer to actual fraudulent transfers as defined under bankruptcy or state law, and that if so in the Ninth Circuit the standard requires something more than mere prepetition exemption planning. 326 B.R. at 787 n.5, citing *Stern*, 345 F.3d at 1044-45; *Wudrick v. Clements*, 451 F.2d at 989-90; *In re Payne*, 323 B.R. 723, 729 n.6 (9th Cir. BAP 2005). In light of the above law and the use in § 522(o) of the term of art “intent to hinder, delay or defraud”, this Court disagrees with and rejects the Trustee’s contention that the purpose of § 522(o) is to prohibit Debtor from benefitting from exemption planning by disposing of nonexempt assets. Unless the Trustee satisfies his burden of proof under Rule 4003(b) and 522(o) to show by a preponderance of the evidence that there is Debtor’s “intent to hinder, delay or defraud” a creditor, in the Ninth Circuit the mere act of prebankruptcy planning to convert nonexempt assets to exempt assets is not proscribed by § 522(o). *Lacounte*, 21 Mont. B.R. at ___; *Stern*, 345 F.3d at 1044-45.

The Trustee urges the Court to infer Debtor's fraudulent intent from the evidence that (1) the Debtor retained the pickup truck after he returned to Montana, sold it and used the proceeds to purchase the mobile home; (2) that he placed the mobile home on his father's property and gave his father a lien, and (3) that the Debtor discussed the matter with his attorney and was informed that he would lose his pickup to a trustee in a bankruptcy. As stated above, under longstanding law the Debtor's sale of his nonexempt pickup truck and purchase of his mobile home which he claimed as a exempt homestead prior to bankruptcy, by itself, is not fraudulent per se. *Lacounte*, 21 Mont. B.R. at __; *Wudrick v. Clements*, 451 F.2d at 989-90; *Stern*, 345 F.3d at 1043.

With regard to interpretation of the phrase "with the intent to hinder, delay, or defraud a creditor", this Court in *Lacounte* quoted case law such as *Devers v. Bank of Sheridan (In re Devers)*, 759 F.2d 751, 753 (9th Cir. 1985), where the Ninth Circuit Court of Appeals held that, under § 727(a)(2), a plaintiff must demonstrate a debtor's actual intent to conceal assets, or to hinder, delay, or defraud creditors. The Court in *Devers* wrote:

[An] actual intent to hinder, delay, or defraud must be shown. Constructive fraudulent intent cannot be the basis for denial of discharge, *In re Adlman*, 541 F.2d 999, 1003 (2d Cir.1976), but fraudulent intent may be established by circumstantial evidence, or by inferences drawn from a course of conduct. *Farmers Co-op Association v. Strunk*, 671 F.2d 391, 395 (10th Cir.1982). The statute is to be construed liberally in favor of debtors and strictly against the objector. *In re Adlman*, 541 F.2d at 1003; *In re Rubin*, 12 B.R. 436, 440 (Bankr. S.D.N.Y. 1981).

* * *

Because a debtor is unlikely to testify directly that his intent was fraudulent, the courts may deduce fraudulent intent from all the facts and circumstances of a case. *In re Nazarian*, 18 B.R. 143, 146 (Bankr. D.Md.1982).

759 F.2d at 753-54; *In re Weyer*, 16 Mont. B.R. 162, 167-68 (Bankr. D. Mont. 1997); *see also First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339, 1342-43 (9th Cir.1986) (A “discharge of debts may be denied under section 727(a)(2)(A) only upon a finding of actual intent to hinder, delay, or defraud creditors⁶. Constructive fraudulent intent cannot be the basis for denial of a discharge.”) (citing *Devers*).

In *Devers*, this Court denied the debtors a discharge based on their conduct that was found to be in violation of § 727(a). (Unpublished opinion). The conduct complained of by the creditor bank was that debtors were selling secured livestock and commingling the proceeds therefrom with other assets. In addition, the debtors were unable to explain the disappearance of missing ranch equipment.

The Ninth Circuit affirmed the decision of this Court, and the decision of the District Court of Montana, finding that the debtors’ explanation regarding the disappearance of the ranch equipment was:

[Y]et another indication of their disregard of their responsibilities during the reorganization process. The Creditor proved that the Debtors once had owned the tractor, and that they did not produce it for repossession. While the burden of persuasion rests at all times on the creditor objecting to the discharge, it is axiomatic that the debtor cannot prevail if he fails to offer credible evidence after the creditor makes a prima facie case. *In re Reed*, 700 F.2d 986, 992-93 (5th Cir.1983). A debtor's failure to offer a satisfactory explanation when called on by the court is a sufficient ground for denial of discharge under section 727(a)(5).

Devers, 759 F.2d at 754. As explained further by the Ninth Circuit in a later case, under §

⁶The Ninth Circuit in *Adeeb* did not distinguish between plural “creditors” and the singular “a creditor” in § 727(a)(2)(A). 787 F.2d at 1342-43. That suffices to reject the Debtor’s argument that § 522(o) requires identification of a specific single creditor instead of creditors in general.

727(a)(2)(A):

Denial of discharge . . . need not rest on a finding of intent to *defraud*. Intent to hinder or delay is sufficient. *Matter of Smiley*, 864 F.2d 562, 568 (7th Cir.1989); *In re Adeeb*, 787 F.2d 1339, 1343 (9th Cir.1986). Furthermore, a debtor need not succeed in harming creditors to warrant denial of discharge because “lack of injury to creditors is irrelevant for purposes of denying a discharge in bankruptcy.”

In re Adeeb, 787 F.2d at 1343. *Lacounte*, 21 Mont. B.R. at ___, quoting *Bernard v. Sheaffer (In re Bernard)*, 96 F.3d 1279, 1281-1282 (9th Cir. 1996).

Applying the above standards, this Court concludes that the Trustee failed to satisfy his burden of proof to show by a preponderance of the evidence that the Debtor disposed of his nonexempt pickup truck with the intent to hinder, delay or defraud a creditor in violation of § 522(o) when he sold it and purchased his mobile home claimed as his homestead with the proceeds.

No allegation or evidence exists in the record of Debtor’s failure to explain the disposition of the proceeds from the pickup truck, or that he sold it to his father for less than fair market value. As stated above, by itself, the Debtor’s sale of the pickup and purchase of an exempt homestead is not proof of intent to hinder, delay or defraud. *Lacounte*, 21 Mont. B.R. at ___; *Wudrick v. Clements*, 451 F.2d at 989-90; *Stern*, 345 F.3d at 1043. The Debtor testified that he needed a home more than he needed the expense of maintaining full insurance coverage for a parked pickup truck that he was not using. The Court finds that Debtor’s explanation for the sale of the pickup truck and purchase of a homestead is credible, and that his conduct was reasonable.

The only other evidence offered by the Trustee to show Debtor’s intent to hinder, delay or defraud creditors was Debtor’s testimony that he met with attorney Tarum and was informed that

he would lose his pickup to a trustee in a bankruptcy. As to the weight given to the Debtor's testimony, the Court finds after observing his demeanor while testifying under oath that the Debtor was a truthful witness and his testimony was credible.

The Court deems the evidence of Debtor's discussion with Tarum and advice he received insufficient to support an inference of intent to hinder, delay or defraud a creditor. The Debtor testified that he did not meet with Tarum until July 2005, and no evidence exists in the record that they met at an earlier date. By July, not only had the Debtor discussed with his father the sale of his pickup truck, but the Trustee's own exhibits, Ex. 1 and Ex. 2, show that his father had already written a check to purchase the Debtor's pickup truck, and further that the Debtor had written a check to Patty Seaman Homes to purchase the mobile home on June 16, 2005. In other words, by the time the Debtor met with Tarum and was told of the potential loss of the pickup truck, the only evidence in the record shows that the pickup had been sold weeks earlier and the proceeds spent purchasing the mobile home. Debtor's discussion with and advice from Tarum occurred after the fact, and fail to show that the Debtor sold the pickup truck and purchased an exempt asset with intent to hinder, delay or defraud a creditor, when those actions occurred at least 2 weeks before Debtor received Tarum's advice. Debtor's other testimony is uncontroverted and shows that no lawsuits had been filed against him, and no collection activity had been pursued against him by creditors, during the period in question when he sold his pickup and purchased the mobile home.

Comparison of the record in this case with *Lacounte* is illustrative in showing why the evidence in the instant case falls short of showing intent to hinder, delay or defraud a creditor. In *Lacounte* the Court disregarded one debtor's testimony as of little weight, and relied on the co-

debtor husband's admission that they sold nonexempt assets with the intent to put the equity that existed in the items of property out of the reach of their creditors, an admission which made it unnecessary to rely on circumstantial evidence or inferences in determining whether the debtors had the requisite intent. *Lacounte*, 21 Mont. B.R. at ___; *Adeeb*, 787 F.2d at 1343. The evidence in the instant case does not include such an admission, and the Trustee failed to show by a preponderance of the evidence that the Debtor sold his pickup truck and purchased a homestead with the proceeds with the intent to hinder, delay or defraud a creditor in violation of § 522(o). With that conclusion the Court need not address the remaining arguments.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this Chapter 7 bankruptcy under 28 U.S.C. § 1334(a).
2. The Trustee's objection to exemption is a core proceeding under 28 U.S.C. § 157(b)(2).
3. The Trustee's objection to exemption was timely filed under F.R.B.P. 4003(b), and Debtor's minor amendment to Schedule D did not render the Trustee's objection moot or subject it to dismissal or automatic exemption for failure to file another objection within 30 days under Rule 4003(b).
4. The Trustee failed his burden of proof to show by a preponderance of the evidence that the Debtor transferred proceeds from the sale of his pickup truck to his homestead with the intent to hinder, delay, or defraud a creditor in violation of 11 U.S.C. § 522(o).

IT IS ORDERED a separate Order shall be entered in conformity with the above denying the Debtor's motion to dismiss, filed January 23, 2006, and overruling the Trustee's

Objection to Exemption filed November 30, 2005.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana